Move To:

Main Contents *(i.e. change chapters)*

Chapter 4: Motions to Suppress Thumbnail Sketch

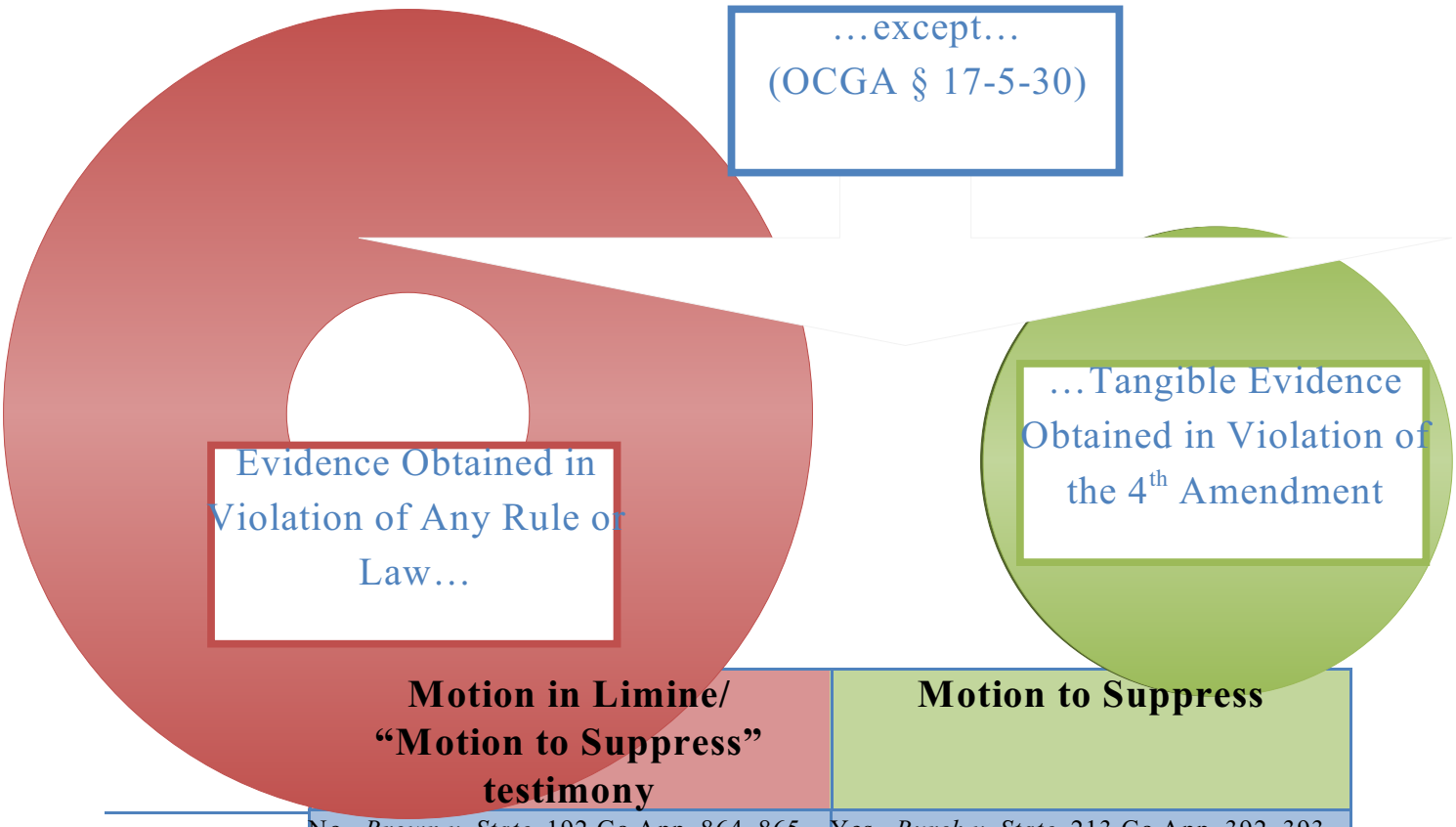
4. MOTIONS TO SUPPRESS - Thumbnail Sketch of Procedures [OCGA 17-5-30]

NOTE - Motion to Suppress and exclusionary rule inapplicable in probation revocation hearings [State v. Thackston, 289 Ga. 412 (2011)].

4 .11 Time - In State or Superior Court must be filed before or within ten days of arraignment if Defendant aware of seizure at that time [USCR § 31.1; *see* Cranford, 275 App. 474, 621 SE2d 470 (2005) (failure to timely file is waiver)]. In any event motion should be filed prior to written entry of plea [Sartin, 201 App. 612, 613(2), 411 SE2d 582 (1991)] and before Defendant announces ready for trial [Highfield, 198 App. 530, 402 SE2d 125 (1991)] if seizure is then known to Defendant. Motion to Suppress was unknown at common law; it was statutorily created response in 1966 to decisions following Mapp v. Ohio, 367 U.S. 643 (1961), applying the exclusionary rule to the states [Goswick v. State, 150 Ga. App. 279, 257 SE2d 303 (1979)].

- Allowing a late motion under USCR § 31.1 must be done in writing. When faced with an untimely motion, the Court may deny the motion of allow it ***in writing***, but may not orally allow it to proceed [Gomez, Gomez, 266 App. 423, 597 SE2d 509 (2004)]. (**Caution** - denial of request for late motion for person *unrepresented* at arraignment may require finding of wilfulness.in delay).
- Cannot avoid time limit by couching challenge to "evidence seized in an allegedly unlawful search" as a motion in limine [Fraser, 283 App. 477, 642 SE2d 129 (2007)].
- Failure to object waives timeliness issue, particularly in view of ability of court to allow late filing [Hicks, 287 App. 105, 650 SE2d 767 (2007)] (See **4.12 BOX** for non-constitutional grounds attacking evidence).

4 .12 Subjects - "Only tangible physical evidence is subject to motions to suppress. Testimony is outside the scope of a motion to suppress and should be objected to on the trial." [Shaw, 247 App. 867, 869 (1), 545 SE2d 399 (2001); Maxwell, 285 App. 685, 647 SE2d 374 (2007)(motion in limine may also challenge testimony); Brundige v. State (Ga.App. #A11A0165, 7/14/2011) (tangible evidence includes thermal imaging, interpreting OCGA 17-5-21)]. It does not apply however to identification evidence, or to admissibility of a defendant's confession [Stinski, 281 Ga. 783, 642 SE2d 1 (2007); Baker, 230 Ga. 741, 199 SE2d 252 (1973); High 145 App. 772, 244 SE2d 888 (1978)]. (Note these are heard at time of trial).



	Motion in Limine/ "Motion to Suppress" testimony	**Motion to Suppress**
Must be in Writing?	No. *Brown v. State*, 192 Ga.App. 864, 865 (1989).	Yes. *Burch v. State*, 213 Ga.App. 392, 393 (1994) – unless seizure unknown to defendant prior to trial. *Rucker v. State*, 250 Ga. 371 (1982).
Must be Filed before Trial?	Usually. *State v. Johnston*, 249 Ga. 413, 415 (1981) ("'In limine' means 'at the threshold' or before the trial begins"); *but see Boynton v. State*, 287 Ga.App. 778, 781 (2007) ("A motion in limine is any motion, whether made before or during trial, to exclude…"). Discretionary. Not for *Jackson v. Denno* hearing (below) or other constitutional issues.	Yes. *Burch v. State*, 213 Ga.App. 392, 393 (1994) – unless seizure unknown to defendant prior to trial. *Rucker v. State*, 250 Ga. 371 (1982).
Must be Filed within 10 Days of Arraignment?	Effectively, no. Hearing the motion is discretionary, Court may require objection to evidence. *Johnston*, *Hernandez v. State*, 297 Ga.App. 177, 178 (2009). OCGA § 17-7-110 applies to "[a]ll pretrial motions," but no authority holds that this includes motions in limine. It has been implied that motions in limine are not time-limited, in ruling on attempts to couch late motion to suppress as motions in limine. *See, e.g., Cayruth v. State*, 273 Ga.App. 166, 166 (2005). Constitutional objections, see *Higuera-Hernandez v. State*, 289 Ga. 553 (2011).	Yes. OCGA § 17-7-110; *Walker v. State*, 277 Ga.App. 485, 488 (2006)) – unless seizure unknown to defendant prior to trial. *Rucker v. State*, 250 Ga. 371 (1982).

	Motion in Limine/ "Motion to Suppress" testimony	Motion to Suppress
Court must make Pretrial Ruling?	No. *Hernandez v. State*, 297 Ga.App. 177, 178 (2009). If a motion to suppress/in limine is made with respect to the Defendant's ***custodial statements***, an evidentiary hearing outside the jury's presence (*Jackson v. Denno* hearing) must be held prior to the introduction of the evidence, but only if the request is made/renewed at trial. *Parrish v. State*, 194 Ga. App. 760, 761 (2) (1990).	Implied yes. See contrasting discussion of motions in *State v. Johnston*, 249 Ga. 413, 415 (1981).
Failure to File Invalidates Objection at Trial?	Definitely not as to constitutional objections (may be made any time before jury retires). *Higuera-Hernandez v. State*, 289 Ga. 553 (2011). Apparently, though not explicitly, no as to other issues. *Mangrum v. State*, 285 Ga. 676, 677 (2009) (waiver from failure to object "in motion *or at trial*") (emphasis added).	Yes. *Cranford v. State*, 275 Ga.App. 474, 475 (2005) (with oral objection); *Johnson v. State*, 261 Ga.App. 98, 102 (2003) (with oral objection).
Failure to Object at Trial Invalidates Motion?	No, if Court has ruled on the motion in limine. *Dasher v. State*, 285 Ga. 308, 311 (2009) (denied); *Lewis v. State*, 279 Ga. 69 (2005) (granted). Yes, if Court has not ruled on motion in limine. *Zehner v. State*, 241 Ga.App. 345, 345 (1999). Yes, if the Court has granted a motion in limine for the opposing side. *Robinson v. State*, 173 Ga.App. 260, 261 (1985).	No, if adverse ruling from Court. Not clear, if Court fails to rule or schedule hearing.
Failure to File Waives Issue on Appeal?	Apparently, though not explicitly, no. *Mangrum v. State*, 285 Ga. 676, 677 (2009) (waiver from failure to object "in motion *or at trial*") (emphasis added). *See also Parrish v. State*, 194 Ga. App. 760, 761 (2) (1990). Constitutional objections, see *Higuera-Hernandez v. State*, 289 Ga. 553 (2011).	Yes. *Horton v. State*, 269 Ga.App. 407, 409 (2004) (no objection at trial).

NOTE - Motions to suppress are also limited to the "***protection of constitutional guarantees against unreasonable search and seizure only***" by the Georgia Supreme Court [State v. Johnston, 249 Ga. 413, 291 SE2d 543 (1982) (correcting Court of Appeals for not treating a "motion to suppress" blood alcohol tests on statutory grounds as a discretionary motion in limine, despite the party's nomenclature; *accord* Thomas v. State, 287 Ga.App. 124, 650 SE2d 793 (2007)]. The Supreme Court further stated in this regard that "***The results of a breath test are not admissible over objection unless a proper [statutory] foundation is laid***." Therefore, the authority which permits a trial court to reject a constitutional challenge made at the time of trial as untimely [OCGA 17-5-30(b); Uniform Superior Court Rule 31.1; Copeland v. State, 272 Ga. 816, 817(2), 537 SE2d 78 (2000)] would not justify rejecting a failure to comply with a ***statutory foundation*** (such as implied consent, or two breath samples)].

Numerous cases since Johnston refer to such challenges as motions to suppress, rather than motions in limine, but Johnston remains unreversed - even if reconsidered, the Supreme Court would not find waiver when defense counsel acted in accordance with its authority. A ruling on a motion in limine is a preliminary ruling, subject to change, and not final [Thomas (second prosecution); Helton v. State, 217 Ga.App. 691, 693(1)(c), 458 SE2d 872 (1995); Kitchens v. State, 198 Ga.App. 284, 401 SE2d 552 (1991) (Jackson-Denno hearing on statements)]. In contrast, when a motion to suprress is granted, the evidence cannot be used in a second prosecution [Cook v. State, 141 Ga.App. 241, 233 SE2d 60 (1977)].

Suppression of tangible evidence due to violation of constitutional guarantees against unreasonable search and seizure must be by written pretrial motion unless the defendant becomes aware of the seizure so late that a written motion is impossible [Rucker v. State, 250 Ga. 371, 297 S.E.2d 481 (1982); Dunn v. State, 262 Ga.App. 643, 586 S.E.2d 352 (2003); see **4.11, 4.13**]; any other issue of violation of constitutional rights can be made orally any time before the jury retires [Higuera-Hernandez v. State, 289 Ga. 553 (2011)].

4 .13 Contents

A. ***Written*** [OCGA 17-5-30 (b)]: however, ***oral*** motion may be allowed at trial ***if*** defendant did not know of the existence of the search previously [Rucker, 250 Ga. 371, 297 SE2d 481 (1982); *accord*, Burch v. State, 213 Ga.App. 392, 393, 444 SE2d 370 (1994)]; otherwise, failure to file written motion to suppress waives objection [Cranford, 275 App. 474, 621 SE2d 470 (2005)];

B. Contents of any brief supplements any technical omissions of the actual motion [Stanley, 206 App. 125, 424 SE2d 90 (1992)];

C. Must state facts and not merely conclusions [Strong, 161 App. 606(2), 288 SE2d 921 (1982); Rouse, 241 App. 167, 526 SE2d 360 (1999) (warrantless search); Overton, 270 App. 285, 606 SE2d 306 (2004)

(never mentioned roadblock or anything other than legal conclusions)];

D. Defendant may not rely on grounds for suppression not raised in his written motion [Armstrong, 203 App. 159, 416 SE2d 537 (1992); Conley, 273 App. 855, 616 SE2d 174 (2005) (where nothing in motion indicated challenge to articulable suspicion for stop suppression could not be based thereon - grounds asserted let State know what witnesses to bring)];

RECOMMENDATION - Court may wish to have defense counsel summarize grounds asserted for suppression at start to ascertain that everyone agrees on grounds at issue.

NOTE - at time of publication, an important case on what must be in motion to raise issues is before the Supreme Court on cert. [Rodriguez v. State, 321 Ga.App. 619, 746 SE2d 366 (April 12, 2013) (Whole court, physical precedent only)].

E. If search based on warrant, motion should state particular insufficiencies of the affidavit [Cadle, 131 App. 175, 205 SE2d 529 (1974)]; but no technical pleading required beyond "facts showing that the search an seizure were unlawful" [Watts, 274 Ga. 373, 552 SE2d 523 (2001); *but see* Young, 282 Ga. 735, 653 SE2d 725 (2007) (non-existent warrant)] (Note the defendant must see the affidavit in order to frame a proper motion; if the affidavit contains the name of a confidential informant, the name may be redacted and rest of the affidavit furnished to defendant [Mathiesen, 616 P. 2nd 1255 (Wash App. 1980)]);

F. For warrantless search [Lavelle, 250 Ga. 224, 297 SE2d 234 (1982); Blosfield, 165 App. 111, 299 SE2d 588 (1983); Hill, 222 App. 839, 476 SE2d 634 (1996)], motion is sufficient if it states:

1. The date and location of the search;
2. Identity of the person searched;
3. Material seized;
4. Defendant did not consent to search;
5. Search was not conducted with a search warrant;
6. Was no probable cause for stop, arrest, or search of defendant;
7. Search was in violation of the 4th amendment;
8. Helpful if names and number of officers alleged, if known.

4 .14 Standing

A. Court should ascertain whether Defendant has ***standing before*** considering grounds of suppression [Jackson, 243 App. 330, 533 SE2d 433 (2000)].

B. Burden of establishing standing is on the defendant [Stinski, 281 Ga. 783, 642 SE2d 1 (2007) (state action); Keishian, 202 App.718, 415 SE2d 324 (1992) (legitimate expectation of privacy in the area searched)]; burden on other issues is on the State.

NOTE - Statements of Defendant or others at time of search will generally be inadmissible hearsay insufficient to establish standing if Defendant or other person making statements does not testify at motion [Atwater, 233 Ga.App. 339, 503 SE2d 919 (1998); Carter, 305 Ga.App. 814 (2010)].

C. Seizure must be by a governmental agent, not private citizen [Stinski, 281 Ga. 783, 642 SE2d 1 (2007); Hyatt, 210 App. 425(1), 436 SE2d 540 (1993); Marks, 174 App. 711, 715, 330 SE2d 900 (1993)].

1. Seizures by ***foreign*** governments are admissible even where U.S. agents are present unless foreign employees are acting as agents of a U.S. government or seizure shock the conscience [Thomas, 274 Ga. 156, 167(4), 549 SE2d 359 (2001)].
2. Public employees, who are not law enforcement agents, searching at ***school*** or governmental workplace are subject to the lesser standard of ***reasonableness***, not probable cause [New Jersey v. T.L.O., 469 U.S. 325 (1985) (school); O'Connor v. Ortega, 480 U.S. 709 (1987)].

D. Automatic standing for Defendant's person (including clothing being worn) [Migliore, 240 App. 783, 525 SE2d 166 (1999)]; in contrast there is no standing to challenge search of co-defendant's person [Davis, 283 App. 200, 641 SE2d 205 (2007)].

E. Automatic standing for passenger to challenge *Terry* stop of car - the passenger is temporarily seized as well as the driver [Brendlin v. California, 551 U.S. 249 (2007)].

- As long as all occupants are detained by stop, all can challenge grounds for length of detention under same standards as driver [Davis, 283 App. 200, 641 SE2d 205 (2007)]. See **3.27**.
- Cause for ***search*** different issue - standing to challenge cause for stop of vehicle does not give standing to challenge grounds of subsequent search) [*see* Dixon, 273 App. 740, 743, 615 SE2d 838 (2005); Rakas v. Illinois, 439 U.S. 128 (1978)].

F. Defendant must have an expectation of privacy in the area searched [Dutton, 228 Ga. 850, 188 SE2d 794 (1972), U.S. v. Salvucci, 448 U.S. 83 (1980)]. Factors for whether defendant had a legitimate expectation of privacy in the area searched are:

- Defendant's right to exclude others from the area searched [Rakas v. Illinois, 439 U.S. 128 (1978)]; therefore one can't have expectation of privacy in stolen car [Thomas, 274 Ga. 156, 167(4), 549 SE2d 359 (2001)]. Persons other than property owner may have right of exclusion [see Katz v. U.S., 389 U.S. 347 (1967); U.S. v. Matlock, 415 U.S. 164 (1974)]; overnight guests at residence are protected, but business guests there for

a transaction (legal or illegal) are not protected [Minnesota v. Carter, 525 U.S. 83 (1999)]; no expectation of privacy in garbage bag contents in another person's car [Valle, 282 App. 223, 638 SE2d 394 (2006)].

- Defendant has actually taken reasonable precautions to exclude others from the items seized [Frederick, 226 App. 540, 487 SE2d 107 (1997); U.S. v.Chadwick, 433 U.S. 1 (1977)].
- Defendant's free access to the area over a long period [U.S. v. Jeffers, 342 U.S. 48 (1951)].
- Although defendant's legitimate presence in the area is not alone enough, that in combination with some other interests in the place searched or the items seized might constitute the legitimate interest necessary to establish standing [Rakas v. Illinois, 439 U.S. 128, 143 (1978); see Neely, 159 App. 737, 285 SE2d 190 (1981)].
- No standing to challenge wiretap if not subscriber and voice is not heard [Deleon-Alvarez v. State (Ct. App. #A13A1000, 11/14/2013)].
- Defendant's subjective expectation of privacy [See Rawlings v. Kentucky 448 U.S. 98 (1980)].
- Defendant has a possessory interest in the thing seized [U.S. v. Salvucci 448 U.S. 83 (1980)].

Note - Defendant's denial of ownership eliminates standing, even where initial denial is momentary, followed by claim of ownership [Ledford, 247 App. 412 (2000)].

4 .15 Grounds of suppression

A. Warrantless seizures [see Chapter **3**]

1. Lack of articulable suspicion for stop and temporary detention of defendant (see **3.2**).
2. Lack of probably cause for arrest where seizure ensues from arrest (see **3.3**).
3. No exception to warrant requirement shown, such as: incident to arrest (see **3.33**), mobility exception (see **3.36**), exigent circumstances (see **3.35**), inventory search (see **3.41**).
4. Consent (see **3.12**) and lack of standing or no expectation of privacy (see **4.14**, **3.12**, **3.14**) vitiate need for cause for seizure.
5. Where there is an arrest in violation of state law, but not in violation of constitutional standards, it ***may*** result in suppression [*see* State v. Torres, 290 Ga. App. 804 (2008)].

Note - State law invalidity of an arrest where there is probable cause does not mandate suppression of the fruits of the arrest ***under the Fourth Amendment*** [Virginia v. Moore, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008) (probable cause existed for violation of statute but state law required only citation to issue)]. Georgia appellate court decisions would determine whether suppression of the evidence is required.

Thus, case law implies that the fruits of an arrest outside of a municipal officer's jurisdiction and not justified by hot pursuit or the standards of a citizen's arrest would have to be suppressed [see Glazner, 170 Ga. App.810, 318 SE2d 233 (1984)]. In contrast, the fact that a statute is invalid does not mandate suppression of the fruits of a Terry stop pursuant to it prior to a published decision invalidating it (see § 3.22, 3.24(D) (technical legal distinctions)).

B. Searches with warrant - suppression may be based upon defects in the evidentiary basis presented to the magistrate, defects in the descriptions and other elements of the warrant, other substantial statutory defects in the issuance of the warrant, lack of actual probable cause known to the police, and problems in the execution (such as improper no-knock) [see Chapter **2**].

- No "good faith exception" - The Fourth Amendment does not require suppression when a warrant is issued and executed in good faith, but Georgia law requires suppression [*Compare* Gary v. State, 262 Ga. 573, 422 SE2d 426 (1992) *with* United States v. Leon, 468 U.S. 897 (1984); OCGA 17-5-30 (mandating suppression)].
- Doubtful cases are resolved in favor of the warrant [State v. Hunter, 282 Ga. 278, 646 SE2d 465 (2007) (substantial deference given to magistrate's conclusion, even when magistrate did not have all relevant information); *accord*, Illinois v. Gates, 462 U.S. 213, 236 (1983); Palmer, 285 Ga. 75, 673 SE2d 237 (2009) (deferential standard of review); Davis, 266 Ga. 212, 213, 465 SE2d 438 (1996)].

C. Inevitable discovery doctrine - under ***rare*** circumstances the fruits of an ***illegal seizure need not be suppressed*** where it would have been discovered as a matter of course if independent investigations had proceeded proceeded without the illegal seizure. State must show:

1. Reasonable probability that the evidence in question would have been discovered by lawful means;
2. The lawful means which made discovery inevitable were possessed by the police (prior to illegal seizure) [*compare* Pando, 284 App. 70, 643 SE2d 342 (2007) (probable cause insufficient without illegal fruits)]; and

3. These lawful means were being actively pursued prior to the occurrence of the illegal conduct.
    - Examples - Improper search of car after arrest of recent occupant where car was to be impounded with inventory search [Humphreys, 287 Ga. 63, 694 SE2d 316 (2010)]; runaway interviewed where located in illegal search - would have been interviewed whenever found [Watson, 302 Ga.App. 619, 691 SE2d 378 (2010)]; discovery of witness at murder trial inevitable as part of lawful investigation into the murder, even though document identifying witness suppressed [Hyde, 275 Ga. 693, 572 SE2d 562 (2002)]; improper patdown for weapons during DUI investigation discovers contraband became an inevitable discovery when officer properly arrested person for DUI [Davis, 302 Ga.App. 144, 690 SE2d 464 (2010)]; officer improperly arranged seizure of briefcase through friend of victim but obtained search warrant based on victim's testimony prior to examination of videos within [Wilder, 304 Ga.App. 891, 698 SE2d 374 (2010)].

[Teal, 282 Ga. 319, 647 SE2d 15 (2007) (police were lawfully obtaining warrant without knowing tech was unlawfully obtaining samples at scene)]. Must not be based on speculation but on demonstrated historical facts capable of ready verification or impeachment [Teal quoting Nix v. Williams, 467 U. S. 431, 445 (n. 5) (1984)].

- Applied to ***implied consent in DUI*** after fatal collision where investigating officer sent another officer to obtain blood slightly before he found the evidence at the scene which established probable cause of impaired driving [Cunningham, 284 App. 739, 644 SE2d 878 (2007)];
- **Inevitable discovery rule** may operate to save search invalid under [Arizona v. Gant, 556 U.S. 332 (2009)] based upon likelihood that evidence would have been obtained in inventory search after arrest [Humphreys v. State, 287 Ga. 63, 694 SE2d 316 (2010)];
- Applied to improper seizure of cocaine bag pursuant to a pat-down for weapons, when it would have been discovered after later arrest for DUI [Davis v. State, 302 Ga.App. 144, 690 SE2d 464 (2010)];
- Where *co-defendant*'s illegal arrest happened to prompt confession, likely any police indication of looking at defendants' connections would have prompted it [Ansley v. State (Ct. App. #A13A1078, 11/18/2013)].

- Where juvenile found during improper search of a home, lookout for juvenile runaway and knowledge that juvenile's mother was associated with defendant made discovery inevitable [Watson v. State, 302 Ga. App. 619, 691 SE2d 378 (2010)].

D. Independent source doctrine - Allows admission of evidence that was also discovered by a means wholly independent of any constitutional violation [Nix v. Williams, 467 U. S. 431, 443-44 (1984); Teal, 282 Ga. 319, 647 SE2d 15 (2007); *see* Smithson, 275 App. 591, 621 SE2d 783 (2005)].

4 .16 Hearing - If asserted facts would justify suppression, Defendant is entitled to evidentiary hearing;

A. Burden of Proof - once a proper motion is filed, the burden of proof is on state to show legality of search by a preponderance of the evidence [Davis, 266 Ga. 212, 213, 465 SE2d 438 (1996); Phillips, 167 App. 260, 305 SE2d 918 (1983); U.S. v. Matlock, 415 U.S. 164 (1974)];

NOTE - Deference to factual findings will be limited on appeal if incident videotaped: "Yet, conflicts in the evidence exist because the officer's characterizations of the events are not always consistent with the events as shown on the videotape. The trial court, however, either did not note these inconsistencies or elected not to address them. To the extent the trial court's findings of fact rely upon the officer's testimony which is inconsistent with the objective events recorded on the videotape, we find them clearly erroneous." Berry, 248 App. 874; 547 SE2d 664 (2001).
Review is de novo (no deference) if facts are "undisputed" [Underwood, 283 Ga. 498, 661 SE2d 529 (2008)]. This was recently (questionably?) applied to the significance of 4 out of 6 HGN clues under "law enforcement guideline" despite conflicting evidence from the field exercises [Preston, 293 App. 94, 666 SE2d 417 (2008)].

B. Search incident to arrest - burden of proof

1. Arrest Warrant - Where arrest is based on warrant, warrant may be presumed valid and Defendant must offer some showing of illegality before State is required to show probable cause for warrant [Buchanan, 259 App. 272, 275, 576 SE2d 556 (2002); Harvey; Singleton, 194 App. 423(1), 390 SE2d 648 (1990); Callaway, 257 Ga. 12, 13-14(2), 354 SE2d 118 (1987)]. See **3.21**C.
2. "Collective knowledge" - Based upon probable cause from dispatch/other police officers - where basis of stop or arrest is look-out, the State has burden of showing underlying factual basis of probable cause [Duke, 257 App. 609, 571 SE2d 414 (2002)].

C. However, Defendant at hearing must raise all alleged defects in the search, and issues not raised are waived [Cross, 233 Ga. 960, 214 SE2d 374 (1975)]; therefore, requiring Defendant to outline all grounds at start of hearing can be useful;

D. **Defendant has a right to be present** which may not be waived by counsel unless done in the defendant's presence on the record at an earlier Court appearance), or with defendant' express written authority, or if defendant on record later waives his previous absence [McGinnis, 208 App.354, 430 SE2d 618 (1993)];

E. If defendant is on probation the suppression hearing may be combined with probation revocation hearing [Davenport, 172 App. 606 , 324 SE2d 201 (1984)]; this case suggests that the motion hearing may be combined with any non-jury trial;

F. Defendant may testify and his testimony is not admissible in the State's case-in-chief [Culpepper, 132 App. 733, 209 SE2d 18 (1974); U.S. v. Simmons, 390 U.S. 377 (1968)]; however, many Courts have held that Defendant's testimony at the suppression hearing may be used to impeach his or her contradictory testimony at trial [U.S.v Quesada-Rosadal, 685 F. 2nd 1281 (11th Cir 1982)];

G. If a search warrant is involved, ***the warrant and supporting affidavit must be introduced into evidence***, or at the least, be read into the record [Sosebee v. State, 303 Ga. App. 499, 501-502 (1), 693 SE2d 838 (2010); Smith v. State (Ct. App. #A13A1119, 11/7/2013); Russell, 181 App. 624, 353 SE2d 820 (1987); *see* United States v. Pratt, 438 F.3d 1264 (11th Cir., 2006) (No constitutional requirement to admit copy of warrant but *exact language* of description place to be searched and items to be seized must be shown by preponderance of evidence - here template language survived on computer)]; duplicate copy is admissible [Barrett, 146 App. 207, 245 SE2d 890 (1978)]; if the factual allegations of the motion raise the legality of the warrant and the warrant and affidavit are not in evidence then the State has not met its initial burden of proof [*compare* Watts, 274 Ga. 373, 552 SE2d 823 (2001); *with* Hall, 258 App. 502, 574 SE2d 610 (2002); *see also* Colon, 275 App. 73, 619 SE2d 773 (2005) (affidavit may be enough if existence of search warrant not disputed); Young, 282 Ga. 735, 653 SE2d 725 (2007) (non-existence of warrant not raised in motion, affidavit in evidence); Tyre v. State, 323 Ga.App. 37, 747 SE2d 106 (2013) (OK where affidavit and warrant already in court record and officer obtaining warrant testified about process); *but see Sosebee*, 303 Ga. App. 499 at n. 2 (there may be no substitute for entering warrant under *Watts*)]. The new evidence code may allow hearsay about the warrant in the absence of objection, also.

H. It is not necessary in the ordinary case to introduce the items seized in evidence [Parks, 150 App. 446, 258 SE2d 66 (1979)];

I. If Defendant is alleging that the confidential informant is fictional, conduct *in camera* hearing outside presence of defendant and defense

attorney [Smith, 192 App. 144, 384 SE2d 677 (1989) (in camera proceedings where CI involved), Gray, 204 App. 33, 418 SE2d 33 (1992); Moore, 187 App. 387, 370 SE2d 511 (1988) (informant alleged to be fictional), Miller, 169 App. 552, 314 SE2d 120 (1984)];

NOTE - If the Defendant is seeking the identity of a confidential informant, review Ivory, 234 App. 858, 859 (2), 508 SE2d 421 (1998). CI's are rarely disclosed; never, if a mere 'tipster' rather than a witness or participant.

J. Judge decides on credibility of the witnesses [Brassell,144 App. 279, 241 SE2d 57 (1977)];

K. "Reliable" hearsay admissible to establish probable cause [Morrow, 257 App. 707, 572 SE2d 58 (2002)] (see **2.22**);

L. Search Warrant cases - If it is alleged that part of the affidavit is false, the Court excises information proven to be false, weighs the remaining information and determines if it establishes probable cause; if so, the search warrant stands, if not, suppression is granted [Williams, 232 Ga. 213, 205 SE2d 859 (1974), Daniels, 183 App. 651, 354 SE2d 735 (1987), Ledbetter, 190 App. 843, 380 SE2d 313 (1989)];

M. If defendant and attorney fail to appear at the hearing, the motion is dismissed as abandoned, the evidence comes in at trial [Jacobs v. Hopper, 238 Ga. 461, 233 SE2d 169 (1977); O'Berry v. Wainwright, 546 F 2nd 1204 (5th Cir. 1977)];

4 .17 Judge is fact finder, passing on both law and fact [OCGA 17-5-30 (b)]:

A. ***Written*** finding of facts of conclusions of law are not required [Shirley, 166 App. 456, 304 SE2d 468 (1983)]; however, court should make explicit legal findings as to areas of Defendant's challenge and State's legal contentions on the record, including, if applicable:
   1. Articulable suspicion if *Terry* stop;
   2. Probable cause, if search incident to arrest or warrant;
   3. Consent or other exception to warrant requirement [Bibbins v. State, 271 App. 90, 609 SE2d 362 (2004) (remanded to trial court since no finding as to consent was made)]

B. If a defendant is arrested based on illegal search the Court may also have to grant a motion to suppress statements made by the defendant at the time of the arrest as barred under the fruit of the poisonous tree doctrine [Fiallo, 240 App. 278, 523 SE2d 355 (1999)]).
   - Property lawfully obtained (abandoned by being thrown on sidewalk) properly suppressed when person discarding items is ***identified by unlawful search*** of car [Nesbitt, 305 Ga.App. 28 (1, 3), 699 SE2d 368 (2010)].

4 .18 Decision is made by judge prior to trial.

A. State has right of appeal from "the superior courts and such other courts from which a direct appeal is authorized to the Court of Appeals"[OCGA 5-7-1].

B. If defendant loses suppression motion, the lawfulness of the search may not be re-litigated before the finder of fact at trial.

4 .19 Modification of Order - Court may vacate its order within term and allow the State to introduce additional evidence; also, even if a Judge denied a motion to suppress, another Judge of the circuit may grant a motion for rehearing and after hearing to grant the motion to suppress [Marcos, 206 App. 385, 425 SE2d 351 (1993); Chastain, 158 App. 654, 281 SE2d 629 (1981)].

4.20 Review of findings

A. Warrant - Substantial deference by ***trial court*** to magistrate's determination (see **4.15**B)

B. Trial court decides credibility as to testimony - may accept or reject any portion of testimony, even when uncontradicted [Tolbert, 300 App. 51, 684 SE2d 120 (2009); Starks, 281 App. 15, 635 SE2d 327 (2006)]

C. On appeal, evidence is viewed in light most favorable to upholding trial court's decision [Tolbert] - Subject to deference to magistrate's determination in warrant cases, "the trial court's findings as to *disputed facts* will be upheld unless clearly erroneous and the trial court's application of the law to undisputed facts is subject to de novo review" [Palmer, 285 Ga. 75, 673 SE2d 237 (2009)].

- "Where the evidence is uncontroverted and no question regarding the credibility of witnesses is presented, the trial court's application of the law to undisputed facts is subject to de novo appellate review" [Underwood, 283 Ga. 498, 661 SE2d 529 (2008); *but see* Tolbert, *supra*].

D. Therefore, although written findings of facts are not required, they are often advisable, ***particularly*** if court rejects evidence on credibility grounds in absence of clear and direct testimonial conflict.

NOTE - Deference to factual findings will be limited on appeal if incident videotaped: "Yet, conflicts in the evidence exist because the officer's characterizations of the events are not always consistent with the events as shown on the videotape. The trial court, however, either did not note these inconsistencies or elected not to address them. To the extent the trial court's findings of fact rely upon the officer's testimony which is inconsistent with the objective events recorded on the videotape, we find them clearly erroneous." State v. Berry, 248 App. 874, 547 SE2d 664 (2001).